

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
FOURTH REGION**

NORTHERN HEALTH FACILITIES, INC.  
(a subsidiary of Extendicare Health Services,  
Inc.), d/b/a MOUNTAIN CITY NURSING  
and REHABILITATION CENTER<sup>1</sup>

Employer

and

Case 4–RC–21674

SEIU HEALTHCARE PENNSYLVANIA

Petitioner

**REGIONAL DIRECTOR’S DECISION  
AND DIRECTION OF ELECTION**

The Employer, Mountain City Nursing and Rehabilitation Center, operates a 297-bed nursing and rehabilitation center in Hazle Township, Pennsylvania. The Petitioner, SEIU Healthcare Pennsylvania, seeks to represent the approximately 47 Licensed Practical Nurses (LPNs) working at this facility.<sup>2</sup> The Employer contends that the LPNs are supervisors within the meaning of Section 2(11) of the National Labor Relations Act, asserting that they have the authority to assign, transfer, responsibly direct, evaluate, hire, discipline, and adjust the grievances of Certified Nurses Assistants (CNAs) at the facility, and the petition should therefore be dismissed. The Petitioner disputes the Employer’s contention that the LPNs are supervisors.

A Hearing Officer of the Board conducted a hearing, and the parties filed briefs. I have considered the evidence and arguments presented by the parties, and, as discussed below, I have concluded that the Employer has failed to establish that the LPNs meet the definition of a supervisor set out in Section 2(11). I shall, therefore, direct an election in the petitioned-for unit.

To provide a context for my discussion, I will begin this Decision with a brief overview of the Employer’s operations. I will then review the factors that must be evaluated in resolving

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<sup>1</sup> The Employer’s name appears as amended at the hearing.

<sup>2</sup> The job title for the position at issue, as reflected in various documents submitted at the hearing, including the job description, is “LPN Supervisor.” For brevity and clarity, this Decision will refer to these employees simply as “LPNs.”

the supervisory issue, followed by the relevant facts and the reasoning that supports my conclusion.

## **I. OVERVIEW OF OPERATIONS**

The Employer's nursing and rehabilitation facility consists of two buildings, known as the Blue Building and the White Building. The Blue Building has four floors, three of which house residents. Each resident floor is divided into three wings, and each wing has between eight and ten resident rooms.

The White Building has three floors. Residents occupy two of the floors, and, like the Blue Building, each White Building resident floor is divided into three wings. The wings all have 10 resident rooms.

Administrator Cindy Walk is the highest-ranking official at the facility and has overall supervision for its operations. Eleven Department Heads report to Walk.

The Nursing Department has primary responsibility for providing care to the residents. The Director of Nursing (DON) is in charge of the Nursing Department and reports directly to Administrator Walk. John Gonzalez was the DON until early April 2010 when he left the employ of the Employer. Mary Fabiansky is presently serving in this position on a temporary basis.

Reporting to the DON are the Director of Education and Training, the Clinical Reimbursement Coordinator, and two Assistant Directors of Nursing (ADONs). One ADON is assigned to each Building. Renee Rusnock currently serves as the ADON in the Blue Building. The White Building ADON position is open, and Rusnock is temporarily covering that position as well. The ADONs are usually present at the facility between 7:30 a.m. and 5 p.m., Monday through Friday.

Beneath the ADONs in the Nursing Department organizational hierarchy are five Registered Nurse (RN) Unit Managers and a Nursing Scheduler. There is one Unit Manager for each floor on which residents are housed. The Unit Managers in the Blue Building are Kathleen Kapuscinsky, Karen Vandak, and Mary Ann Marek. Barbara Zaylskus serves as a Unit Manager in the White Building, and the other White Building Unit Manager slot is presently open. Like the ADONs, the RN Unit Managers typically work on weekdays from 7:30 a.m. to 5 p.m.

Nursing Department employees below the Unit Manager position work on three shifts. Day shift runs from 7 a.m. to 3:30 p.m. Afternoon shift extends from 3 p.m. to 11:30 p.m. Evening shift hours are 11 p.m. to 7:30 a.m.

One RN Supervisor is assigned to the Blue Building, and one RN Supervisor is assigned to the White Building, on each of the afternoon and evening shifts during the week and on all three shifts on weekends. LPNs and CNAs report to the Unit Managers when they are present

and to the RN Supervisors when the Unit Managers are not at work. The parties stipulated that the Unit Managers and RN Supervisors are supervisors within the meaning of the Act.

The Employer employs about 45 LPNs<sup>3</sup> and 110 CNAs. 31 LPNs are classified as full-time employees, three LPNs are considered part-time, and 11 LPNs work as needed on a per diem basis. There are 99 full-time and 11 per diem CNAs.

Two LPNs are normally assigned to each of the five resident floors on the day and afternoon shifts, and there is one LPN per floor on the evening shift. The number of CNAs varies with the resident count. Between four and six CNAs are usually assigned to each resident floor on day and afternoon shifts. Two CNAs are assigned to each resident floor on the evening shift.

In addition to the RNs, LPNs, and CNAs, the Nursing Department includes a Clerk, four Unit Secretaries, and three Clinical Reimbursement Specialists. The Clerk reports directly to the DON, and the secretaries report to the Unit Managers. The Clinical Reimbursement Specialists are supervised by the Clinical Reimbursement Coordinator.

The Petitioner represents the CNAs and other non-professional employees at the Employer's facility. There are approximately 160 employees in the non-professional bargaining unit which includes, in addition to the CNAs, employees in the Dietary, Activities, and Maintenance Departments. The Petitioner was certified as the representative for this unit in 2008, and the parties signed an initial contract in March 2009, which is effective through March 2013.

## **II. FACTORS RELEVANT TO EVALUATING SUPERVISORY STATUS**

The burden of establishing supervisory status is on the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001); *Dean & DeLuca New York, Inc.*, 338 NLRB 1046, 1047 (2003). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Dean & DeLuca*, above at 1047 (2003). Section 2(11) of the Act sets forth a three-part test for determining whether an individual is a supervisor. Pursuant to this test, employees are statutory supervisors if: (1) they hold the authority to engage in any one of the 12 supervisory functions listed in Section 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. See *NLRB v. Kentucky River Community Care, Inc.*, above at 712-713; *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-574 (1994).

The statutory criteria for supervisory status set forth in Section 2(11) are read in the disjunctive, and possession of any one of the indicia listed is sufficient to make an individual a

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<sup>3</sup> At times, the record indicates that there are 47 LPNs at the facility.

supervisor. *Kentucky River*, above at 713; *Juniper Industries, Inc.*, 311 NLRB 109, 110 (1993). The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions; between effective recommendation and forceful suggestions; and between the appearance of supervision and supervision in fact. The exercise of some supervisory authority in a merely routine, clerical, or perfunctory manner does not confer supervisory status on an employee. See *J.C. Brock Corp.*, 314 NLRB 157, 158 (1994); *Juniper Industries*, above at 110. The authority effectively to recommend an action means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation ultimately is followed. See *Children's Farm Home*, 324 NLRB 61 (1997); *Hawaiian Telephone Co.*, 186 NLRB 1 (1970). The Board has an obligation not to construe the statutory language too broadly because the individual found to be a supervisor is denied the protection of the Act. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1058 (2006); *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995). Where the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *Dole Fresh Vegetables Inc.*, 339 NLRB 785, 792 (2003); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). The sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. See *Kanahwa Stone Co.*, 334 NLRB 235, 237 (2001); *Gaines Electric*, 309 NLRB 1077, 1078 (1992).

In *Kentucky River*, the Court decided, contrary to the Board, that RNs at a residential nursing care facility were supervisors within the meaning of the Act. In determining that the nurses were not supervisors, the Board had found, inter alia, that while they directed the work of nurses' aides, this direction did not involve independent judgment because it was by virtue of the nurses' training and experience, not because of their connection with management. The Court acknowledged that the term "independent judgment" is ambiguous with respect to the *degree* of discretion required for supervisory status and recognized that it was "within the Board's discretion to determine, within reason, what scope of discretion qualifies." 532 U.S. at 713. The Court rejected the Board's analysis, however, because the Board erroneously excluded, "ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards" from the statutory definition of independent judgment, even where the employees exercised a sufficient degree of discretion to otherwise warrant a supervisory finding. *Ibid.* In all other respects, the Court left intact the Board's traditional role in drawing the line between the performance of functions which are clerical and routine and assignment and direction that involve a sufficient element of discretion to confer supervisory status.<sup>4</sup> Thus, the Court did not hold that every exercise of professional or technical judgment in directing other employees is necessarily an exercise of independent judgment, but recognized that the Board could determine the degree of independent judgment necessary to meet the statutory threshold for supervisory status. *Id.* at 714.

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<sup>4</sup> The Court also indicated that, "the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer." *Id.* at 713-714.

In the *Oakwood*, *Croft Metal*, and *Golden Crest Healthcare* decisions, the Board clarified the circumstances in which it will find that individuals exercise sufficient discretion in performing two of the functions listed in Section 2(11) – assignment and responsible direction of work – to justify their classification as statutory supervisors.<sup>5</sup> As clarified in *Oakwood*, the term “assign” refers to the “act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period) or giving significant overall duties, i.e., tasks, to an employee.” *Oakwood* at 689-690. In the health care setting, the term “assign” encompasses the responsibility to assign other employees to particular patients. *Id.*

In *Oakwood*, the Board explained “responsible direction,” as follows: “If a person on the shop floor has ‘men under him,’ and if that person decides ‘what job shall be undertaken next or who shall do it,’ that person is a supervisor, provided that the direction is both ‘responsible . . . and carried out with independent judgment.’”<sup>6</sup> “Responsible direction,” in contrast to “assignment,” can involve the delegation of discrete tasks as opposed to overall duties. *Oakwood*, at 690-692. But, an individual will be found to have the authority to responsibly direct other employees only if the individual is *accountable* for the performance of the tasks by the other employee. Accountability means that the employer has delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary, and the putative supervisor faces the prospect of adverse consequences if the employees under his or her command fail to perform their tasks correctly. *Ibid.*

Assignment or responsible direction will, as noted above, produce a finding of supervisory status only if the exercise of independent judgment is involved. Independent judgment will be found where the alleged supervisor acts free from the control of others, is required to form an opinion by discerning and comparing data, and makes a decision not dictated by circumstances or company policy. *Oakwood*, at 692-694. Independent judgment requires that the decision “rise above the merely routine or clerical.” *Ibid.*

### **III. FACTS**

#### *CNA Job Duties*

CNAs provide most of the direct, hands-on care for the residents. They distribute meals, help residents bathe and dress, assist them in getting to activities or meals, and prepare them for doctor’s appointments or other trips out of the facility. Most of the CNAs’ duties are routine and

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<sup>5</sup> The citations to these cases are *Oakwood Health Care, Inc.*, 348 NLRB 686 (2006), *Croft Metals, Inc.*, 348 NLRB 717 (2006), and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006).

<sup>6</sup> In providing this explanation, the Board referred to statements made by Senator Flanders during the 1947 Senate hearings concerning the Act. At those hearings, Senator Flanders offered the amendment adding the phrase “responsibly to direct” to Section 2(11). See NLRB, Legislative History of the Labor Management Relations Act of 1947, 103-104.

do not vary from day-to-day. CNAs also perform some functions on an intermittent basis, such as weighing residents or collecting urine or other specimens. A resident's condition may also change from one day to the next, requiring CNAs to provide more or less care.

### *LPN Job Duties and Job Description*

Like the CNAs, LPNs have certain duties which they perform every day. LPNs distribute medications and provide wound care and other treatments for residents. They are required to count narcotics at the start of each shift and write down phoned-in physician orders. LPNs maintain records of care provided to residents and deal with questions and complaints from residents' family members.

In addition to these functions, the LPNs' job description lists a number of functions classified as "supervisory responsibilities."<sup>7</sup> According to the job description, LPNs make daily work assignments, schedule breaks, and direct work. The job description also indicates that LPNs: can authorize employees to leave work early or work overtime; may move employees from one area of the facility to another area; prepare written evaluations; have authority to discipline or suspend employees; initial time records; and handle employee complaints.

Employer witnesses indicated, however, that the LPNs do not actually perform some of the supervisory functions listed on the job description. For example, they stated that LPNs do not have the authority to allow CNAs to leave early or work overtime and are not responsible for initialing time records.

With respect to some of the additional duties listed on the LPN job description, there is some confusion about the extent of LPN authority. RNs periodically evaluate LPNs using one of two forms. Both forms list all of the LPN supervisory responsibilities set forth in the job description and call for an evaluation of the manner in which the LPNs perform each of these functions. On many of the forms introduced into evidence, however, the evaluators described certain duties as "N/A" (non-applicable), and they did not evaluate the LPNs in these areas. These duties include disciplining and suspending CNAs, moving CNAs from one area to another, and handling CNA complaints. The failure to rate LPNs as to these functions suggests that these evaluators did not believe the LPNs performed them.<sup>8</sup> Some other evaluators did evaluate the LPNs on these functions.

The evidence as to the relevant supervisory indicia is as follows:

### *Assignment and Transfers*

The Nursing Scheduler assigns LPNs and CNAs to particular days and shifts and designates the building and floor on which they will work. On each floor, one or two CNAs are designated to provide care for the residents on one of a floor's three wings. On at least one floor,

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<sup>7</sup> The job description is given to LPNs during their orientations.

<sup>8</sup> On some other LPN evaluation forms, these areas were simply left blank.

CNAs are permanently assigned to a particular wing, but on other floors, CNA wing assignments are rotated on a weekly, biweekly, or monthly basis. On evening shift when only two CNAs are present on each floor, the CNAs simply divide the residents into two equal groups. Evening-shift CNA Peter DeMarco testified that LPNs are not involved in determining evening-shift patient assignments on the floors where he works; the CNAs split the patients themselves.

On most floors, written assignment sheets are filled out at the start of each shift. The assignments are mostly predetermined by whatever rotation is used on the floor, and CNAs sometimes complete the assignment sheets on their own. LPNs on occasion also complete the portion of the assignment sheets indicating the patients to which each CNA is assigned.

The record is not clear as to who decides the rotation to be used in making patient assignments. Human Resources Manager Valerie Mohutsky testified that she believes that the RN Unit Managers determine the rotations, but ADON Renee Rusnock testified that the LPNs determine the rotations. CNA Cynthia Gimbi was the only witness to describe a specific example of a rotation being established or changed. She testified that the CNAs on her shift complained to RN Unit Manager Barbara Zaylskus about their rotation. When Zaylskus responded that she could not change it, the CNAs spoke to the ADON assigned to their building, and she agreed to switch the rotation from six months to four weeks.

Patient assignments must sometimes be modified due to CNA days off. When a CNA is absent, an LPN may contact the Nursing Scheduler, a Unit Manager, or an RN Supervisor to ask whether a CNA might be moved from another floor to fill in. Employer witnesses maintained that the RN Supervisor might contact LPNs on other floors to ask if they had a CNA to spare, and that LPNs have the authority to decide whether they will release a CNA. The LPNs who testified for the Petitioner, on the other hand, stated that they could not move a CNA to a different floor without securing approval from an RN Supervisor or Unit Manager.

ADON Rusnock and Human Resources Manager Mohutsky were the only witnesses to report on specific examples of CNAs being shifted between floors to cover staffing shortages. In the situation described by Rusnock, she decided that a CNA could be spared from a particular floor and directed one of the LPNs on the floor to select the CNA to be moved. Mohutsky related an incident in which she called LPN Cindy Petruce and asked if a CNA could be spared to help on another floor. Petruce responded that Mohutsky could have a particular CNA for two hours.

Some shifts have “floaters,” i.e., CNAs without specific patient care assignments. These floaters are normally selected if a CNA has to be moved to cover a staffing issue. Seniority is also used in deciding which CNA to shift between floors.

Patient assignments are rearranged if no substitute can be located for an absent employee. CNAs sometimes make the adjustments themselves or an LPN might become involved. Unit Manager Zaylskus testified that LPNs could use a variety of strategies to cover the work of the absent employee, citing as one possibility the use of floaters. Other witnesses indicated that the work of the missing employee is simply divided evenly among the remaining CNAs. LPNs may

also adjust patient assignments during the course of a shift if some CNAs fall behind in their work.

Each day, CNAs perform certain additional duties beyond the routine care they provide for specific patients. They must clean closets and shower rooms and restock linen carts, among other things. On some floors, CNAs are assigned to assist residents with meals or to respond to requests for assistance by room-bound residents while meals are in progress. CNAs on some shifts and floors divide these assignments themselves, while on other shifts and floors, LPNs designate CNAs to perform the assignments. In making designations, LPNs may honor CNA requests for particular assignments or rotate assignments so that CNAs do not always perform the same function. Some shifts follow specified rotations in allocating these jobs. There is no evidence that assignments depend on CNA skills or abilities. As one witness stated, LPNs just “pick somebody.”

CNAs who work an eight-hour shift are entitled by contract to receive two paid 15-minute rest breaks and a 30-minute unpaid lunch break. As indicated in the collective-bargaining agreement, scheduling of the breaks is at “management’s direction.” CNAs on some shifts and floors schedule their own rest and lunch breaks. In other areas, the LPNs designate break times. Set rotations are sometimes followed. For instance, some CNAs on day shift report to work at 6 a.m. rather than the normal 7 a.m. start time. On at least one floor, these early reporters are entitled to the first rest break and lunch break.

Whether breaks are scheduled by CNAs or LPNs, the primary consideration is to ensure adequate staffing-- breaks are timed so that some CNAs are always present to care for residents. LPNs occasionally ask CNAs to delay breaks because of work flow, and CNAs sometimes delay breaks themselves for the same reason. CNAs can usually switch breaks, provided that they inform one of the LPNs on their shift of the change.

Injured CNAs sometimes return to work on light duty status. Human Resources Manager Mohutsky informs the RN or LPNs on the floor where the light duty employee is assigned of the restrictions under which the employee is permitted to work, and the RN or LPN finds tasks for the employee to perform consistent with the restrictions. Typically, CNAs on light duty status distribute ice or snacks, assist in feeding residents, and answer resident call bells.<sup>9</sup> Assignments to light duty workers are made intermittently over the course of the work day, and light duty employees report back to the RN or LPN if they run out of work. If the RN or LPN is not available, light duty employees simply ask other CNAs if they need assistance.

Current employees are assigned to help orient newly-hired CNAs. The Nursing Scheduler sometimes designates a CNA to handle the orientation. Otherwise, an LPN will select a CNA, and they usually select the more experienced employees. The record does not indicate how frequently LPNs designate CNAs to help with orientations.

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<sup>9</sup> Residents use call bells to signal a need for immediate assistance.



### *Direction of work*

The direction of CNA work is another of the supervisory responsibilities listed on the LPN job description. As LPNs distribute medication or perform treatments, they check to make certain the CNAs in their area are performing correctly. An LPN who notices that a task has not been performed properly will call the problem to the CNA's attention.

Since CNA duties are routine, problems are easily detected. For instance, witnesses reported LPNs telling CNAs that they should not take time to clean a shower when meals were being distributed or leave linens on the floor of a resident's room. The witnesses also remembered LPNs criticizing CNAs for failing to provide daily mouth care or distribute ice to residents, neglecting to make certain that residents were wearing slipper socks, leaving a resident on a bed pan too long, or taking extended breaks. If a problem with a CNA's performance persists, an LPN can report the matter to higher-level supervision.

In addition to the overall assignments allocated to CNAs at the start of the shift, LPNs sometimes ask CNAs to perform particular tasks during the course of the workday. Such requests might include putting a resident to bed or taking a resident to the bathroom. The record does not indicate how LPNs decide which CNA should be asked to perform such tasks. LPNs also identify specific functions which CNAs have to perform for residents on a given day, such as taking specimens or making certain a resident does not eat before being given a diagnostic test. Again, the record does not indicate whether such functions are simply given to the CNA assigned to provide routine care for the resident on the day in question or if some other criteria is used in making the assignment.

CNAs may ask LPNs for direction in performing their work. One witness testified that CNAs questioned LPNs about whether residents should be required to get out of bed or were supposed to wear boots. On one occasion, an LPN met with a CNA to suggest approaches the CNA might use in dealing with difficult residents. Another time, an LPN met with CNAs to complain that they were ignoring her instructions.

Some of the LPN witnesses testified that they had never been told they were responsible for the work of the CNAs assigned to their shifts and floors. They have, however, been given copies of the job description which states that they direct CNA work. The Employer also produced a number of appraisals in which LPNs have been criticized for failing to monitor the work of CNAs properly. Among the criticisms were: failing to keep track of CNA breaks; neglecting to make certain CNAs kept resident rooms free of clutter; not checking whether shower rooms had been properly cleaned; and failing to make certain that CNAs obtained required specimens. The record does not indicate that appraisals have any impact on LPN wages or other working conditions.

In addition to the appraisals, the Employer produced several written warnings issued to LPNs for failure to monitor the work of CNAs properly. In February 2009, LPN Lisa Major was warned for failing to ensure proper staffing on her floor by permitting two CNAs to go on break

at the same time. LPNs Jody Hoats<sup>10</sup> and Sharon Kimble were warned in August 2009 for neglecting to make certain that CNAs periodically repositioned residents with wounds. In August 2008, LPNs Dianne Fisher and Esther Waak were warned because they did not have CNAs weigh patients as required by facility policy. Finally, LPNs Lisa Welsh and Barbara Smith were warned in September 2009 because call bells were not answered promptly by CNAs in their area.

### *Evaluations*

Although the LPNs' job description states that they prepare written evaluations of assigned employees, LPN appraisals frequently identified this function as non-applicable. Employer witnesses testified that LPNs prepare evaluations, but the Employer produced only a single CNA appraisal which had been completed by LPNs. This appraisal was completed by LPNs Candy Petruce and Renee Davis in February 2010 for CNA Nancy Kuehn.

The Employer also introduced into evidence two Nursing Assistant Competencies forms which had been prepared by LPNs. "Competencies" are apparently given to new CNAs during their probationary periods. They are also given to more experienced employees to identify performance problems. LPNs Petruce and Davis prepared a Competencies form for CNA Nancy Kuehn in February 2010 which identified "resident unit neatness" as an area in which Kuehn needed development.<sup>11</sup>

LPN Melanie Boxter gave CNA Amanda Ferdinand a Competencies form in April 2009. The form indicated that Ferdinand needed to inform an LPN before leaving for break and to avoid staying too long. An RN Unit Manager instructed Boxter to give Ferdinand this form.<sup>12</sup>

Appraisals and Competencies do not have any impact on CNA wages, and there is no record evidence that they affect other CNA working conditions.

### *Discipline*

According to their job description, LPNs have the authority to discipline CNAs, and some of the LPN witnesses reported that at a June 2008 meeting Human Resources Director Mohutsky said that LPNs could impose discipline.<sup>13</sup> The LPNs indicated, however, that this was the only occasion on which they were verbally told they had any disciplinary authority, and the Employer did not introduce into evidence any examples of discipline administered by LPNs.

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<sup>10</sup> Hoats seemingly was unaware of her responsibility for the CNAs' work. In her comments on the warning, she stated that CNAs "should be responsible for own work."

<sup>11</sup> Like the Competencies form, the evaluation indicated that Kuehn needed to show improvement in keeping areas clean. The record does not indicate why Petruce and Davis simultaneously gave Kuehn both an annual appraisal and a Competencies form.

<sup>12</sup> Boxter testified that she had prepared numerous other Competencies forms which were given to CNAs. None of these forms were introduced into evidence.

<sup>13</sup> Other LPNs testified that they had never been told they had the authority to discipline CNAs.

Mohutsky, while asserting that LPNs could impose discipline themselves, conceded that disciplinary actions at the Employer's facility are actually initiated by the RN Supervisors, RN Unit Managers, and ADONs.

LPNs sometimes report misconduct by CNAs, and the Employer presented testimony as to several incidents in which such reports eventually led to disciplinary action. In some cases, the LPNs making the reports indicated they believed discipline should be imposed. But, in each instance, higher-level managers appear to have independently investigated the incidents before deciding to discipline the employees, and the managers determined the degree of discipline which was appropriate. In fact, RN Unit Manager Zaylskus testified that she investigates before taking action on LPN reports of misconduct.

In an October 2009 incident, for instance, a CNA informed LPN Corinne Pena and an RN Supervisor that CNA Eileen Sottolano was not properly entering data into the Employer's computerized record-keeping system. Pena and the RN Supervisor relayed this information to Mohutsky who reviewed the relevant documents, conferred with Administrator Walk, and decided to issue a warning to Sottolano. Pena did not tell Mohutsky that she believed disciplinary action was appropriate.

In a similar incident, an LPN informed Unit Manager Zaylskus that a CNA was not inputting necessary data. Zaylskus verified that the report was accurate and then disciplined the CNA. On another occasion, an LPN told Zaylskus that a CNA left a bedpan in a sink in a resident's room. Zaylskus visited the resident's room to confirm the report before imposing discipline.

ADON Renee Rusnock received a report from an LPN that a CNA made inappropriate comments to a resident. Rusnock interviewed the patient to verify the report before issuing a warning. On another occasion, Rusnock imposed discipline only after reviewing written statements indicating that a CNA made inappropriate comments to another employee.

The Employer introduced into evidence written statements prepared by LPNs in two other cases where warnings were given to CNAs. One of the statements indicates that the LPN reported the incident to her RN Supervisor. In the second case, there is no evidence indicating how or when the statement was prepared or what role it played in the disciplinary process. The record establishes only that a CNA was disciplined and that an LPN prepared a written statement describing the incident for which discipline was imposed.

The Employer's handbook includes a progressive disciplinary policy that provides, *inter alia*, for three disciplinary notices and a "discharge warning" prior to discharge for most offenses.

### *Hiring*

Human Resources Manager Mohutsky conducts an initial interview with all applicants for CNA positions, in which she reviews their qualifications and employment history. Assuming she views the applicant as acceptable, Mohutsky then contacts one of the resident floors and

locates an RN or LPN to interview the applicant. Mohutsky has not given the nurses any guidelines for conducting their interviews.

After speaking with the applicant, the nurse lets Mohutsky know if the applicant's skills seem appropriate and whether the applicant's personality would mesh with that of other employees at the facility. According to Mohutsky, once this process is complete, "depending on the circumstances, most times we'll hire them." Mohutsky stated that the nurse's opinion is "the most important" because Mohutsky knows nothing about nursing skills. Mohutsky insisted she relies very heavily on the nurse's opinion.

There is a high turnover rate for CNAs at the Employer's facility, and Mohutsky reported hiring about 50 CNAs in the past year. She identified only four LPNs who had interviewed applicants. According to Mohutsky, these four LPNs have conducted a total of between 18 and 20 interviews. A fifth LPN, Lori Wurtz, although not mentioned by Mohutsky, testified that she has also interviewed CNA applicants on five or six occasions.

Three of the LPNs who conducted interviews testified at the hearing. Barbara Pcolinsky testified that she was asked to speak with applicants on about five occasions. Mohutsky told her to ask the applicants "a couple of questions" and "check them out." Pcolinsky spoke to the applicants for roughly three minutes. Once this interview was complete, Mohutsky asked how the applicant had done, but did not ask whether Pcolinsky believed the applicant should be hired. Pcolinsky remembered telling Mohutsky one applicant did not speak English and commenting that another applicant had just received her CNA license. Beyond this, she did not recall what report she made to Mohutsky about the applicants she interviewed.

LPN Marian Long testified that she interviewed applicants on about six occasions when RN Unit Manager Mary Ann Marek was unavailable. Mohutsky told Long to ask the applicants nursing questions. Two or three times, she later asked what Long thought of the applicants, and Long offered her opinion about their general appearance and whether the applicants appeared to be knowledgeable about CNA work. Mohutsky did not ask whether Long thought the applicants should be hired. On several other occasions, Mohutsky did not ask Long about the interviews at all.

LPN Lori Wurtz interviewed applicants on five or six occasions. The interviews lasted about 10 minutes during which Wurtz asked questions pertaining to the job. Wurtz has not been asked whether she would hire an applicant, but has volunteered her opinion.

The record does not indicate whether the applicants interviewed by LPNs were hired or what opinions the LPNs offered about particular applicants.

### *Adjusting grievances*

The collective-bargaining agreement covering the CNAs contains a grievance procedure which can be used to resolve "a dispute or complaint arising from the interpretation or application" of the agreement. The grievance procedure has three steps prior to arbitration. RNs serve as the Employer's representative in the first step of the grievance procedure with higher-

ranking managers taking over thereafter. LPNs are not involved in resolving grievances filed under the contractual grievance procedure.

CNAs sometimes approach LPNs with requests for minor adjustments in their work assignments or break schedules. As discussed above, LPNs can permit CNAs to trade break or lunch times. They also at times honor CNA requests to be assigned certain tasks. For instance, an LPN might alter the daily assignment sheet upon request so that a CNA does not have to clean the shower room or fill linen carts on consecutive days. An LPN might also switch patient assignments if a CNA indicates that he or she has a difficult time handling a particular patient or would prefer not to work with a particular co-worker.

Not all adjustments in schedules or assignments require LPN intervention. LPN Wurtz testified that she tells CNAs who complain to her about work assignments to work it out themselves. Other LPNs indicated that they routinely refer complaints to RN Supervisors or Unit Managers. CNAs sometimes adjust breaks or assignments on their own without consulting an LPN.

The CNA collective-bargaining agreement expressly provides that “scheduling of breaks shall be at management’s direction.” It also lists the determination of employee duties and work assignments as rights exclusively reserved to the Employer.

#### *Additional Evidence*

The starting wage rate for CNAs is \$12.75 per hour and for LPNs is \$16 per hour. Newly-hired RN Supervisors are paid \$25 per hour. LPNs receive benefits different from those provided for CNAs under their collective-bargaining agreement.

Excluding the DON, there are seven stipulated supervisors on day shift, two ADONS and five RN Unit Managers, along with 10 LPNs and 25 to 30 CNAs. On afternoon shift, there are two RN Supervisors, 10 LPNs, and 20 to 25 CNAs.<sup>14</sup> The evening shift has two RN Supervisors, five LPNs and 10 CNAs. If the LPNs are considered supervisors, the supervisor-to-employee ratio would be 17 supervisors to between 25 and 30 employees on day shift, 12 supervisors to between 20 and 25 employees on afternoon shift, and seven supervisors to 10 employees on evening shift. Assuming the LPNs are non-supervisory employees, the ratios would be seven supervisors to 35 to 40 employees on day shift, two supervisors to 30 to 35 employees on afternoon shift, and two supervisors to 15 employees on evening shift.

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<sup>14</sup> These totals do not count the ADONS and Unit Managers who are normally present until about 5 p.m.

## **IV. ANALYSIS**

As previously noted, the Employer contends that the LPNs exercise supervisory authority in assigning and transferring, directing work, evaluating, disciplining, hiring, and adjusting the grievances of CNAs. Each of these contentions will be considered in turn.

### **A. Assignment and Transfer**

As discussed above, in *Oakwood* at 689-690, the Board held that the assignment function refers to “the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” The Board also noted that in the health care setting, the term “assign” encompasses the responsibility to assign aides or other employees to provide care for particular patients.

The LPNs sometimes perform functions which fit the Board’s definition of “assign.”<sup>15</sup> They designate CNAs to particular wings within floors, thereby effectively giving the CNAs patient assignments. They adjust assignments to accommodate employee absences and may designate a CNA for transfer to another floor to equalize staffing. They determine which CNAs perform extra tasks such as cleaning showers or stocking linen carts. They designate breaks, make assignments to employees on light duty, and at times determine which CNA will help orient a new employee. The question is whether the LPNs use sufficient discretion in making these assignments to be deemed to exercise “independent judgment” as that term is used in Section 2(11). The record shows that they do not.

The designation of wing assignments is essentially a clerical task and requires no independent judgment; wing assignments are essentially determined by pre-set rotations. To the extent that LPNs are involved in making such assignments, they need only look at where in the rotation particular CNAs fit. Indeed, this task is sometimes performed by the CNAs themselves.

The Employer contends that the LPNs decide on the rotations, but the evidence on this point is in conflict, even between the Employer’s witnesses. While ADON Rusnock testified that LPNs determine the rotations, Human Resources Manager Mohutsky testified that this function is performed by RN Unit Managers. The record contains evidence of only one instance in which a rotation was altered, and that alteration was ordered by an ADON with no apparent involvement by an LPN.

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<sup>15</sup> There is no clear dividing line as to whether performance of particular functions should be characterized as “assignment” or “direction,” and this section of the Decision discusses tasks involving the allocation of work to CNAs that may be viewed as involving direction as opposed to assignment. For both of these indicia, an exercise of independent judgment is required for a finding of supervisory status, and I find the LPNs here do not exercise such judgment in allocating work.

But, even if LPNs determine the assignment rotations for their floors, there is nothing in the record suggesting the criteria they use in performing this function. There is no evidence indicating that they consider employee skill and ability or patient acuity or that they do anything other than simply divide the floor into equal areas and then select a time period after which CNAs will be shifted from one area to another area. The Board does not view assignments as involving an exercise of independent judgment where they are merely designed to equalize workloads. *Royal Health and Rehab Center, Inc.*, 354 NLRB No. 71, at JD slip op. at 6-7 (2009). Nor are purely random assignments deemed to involve a sufficient exercise of judgment to confer supervisory status. *Loparex, Inc.*, 353 NLRB No. 126, slip. op. at 2 (2009), enfd. 591 F.3d 540 (7th Cir. 2009). In a health care context, the Board will find independent judgment in assignment only where consideration of patient needs and relative employee skills is involved. *Bryant Health Center, Inc.*, 353 NLRB No. 80, JD slip op. at 5 (2009); *Barstow Community Hospital*, 352 NLRB 1052, 1053 (2008); *Bethany Medical Center*, 328 NLRB 1094, 1104 (1999). See also, *Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1425 (2007).

Additionally, LPN assignment of break times and extra duties does not require the exercise of independent judgment. The Board has indicated that the authority to approve breaks is normally a routine clerical judgment, *Youville Health Care Center, Inc.*, 326 NLRB 495, 496 (1998), and nothing in this record suggests a different conclusion. Thus, only four to six CNAs work on each floor during a shift, and there are a limited number of break times. Break scheduling in these circumstances consists mainly of dividing the CNAs among the available time periods to make certain that enough CNAs are always present to care for residents. There is no need to consider CNA skills in arranging breaks, and any adjustments are merely designed to accommodate obvious variations in work flow. *Beverly Enterprises v. NLRB*, 148 F.3d 1042, 1047 (8<sup>th</sup> Cir. 1998). The fact that CNAs often arrange and adjust breaks on their own provides further support for a finding that no significant exercise of judgment is involved. *Extendicare Health Services, Inc. v. NLRB*, 182 Fed. Appx. 412, 415 (6<sup>th</sup> Cir. 2006).

LPN participation in the assignment of extra duties is even more routine. No particular skill is involved in cleaning showers, filling linen carts, or assisting residents with meals. Any CNA can perform these functions, and assignment in this context involves nothing more than dividing the functions among a group of equally qualified CNAs. Selection may be random, based on expressed employee preference or designed simply to vary employee assignments from day-to-day. Such rotation of “essentially unskilled and routine duties among available [employees] does not involve the use of independent judgment . . .” *Shaw, Inc.*, 350 NLRB 354, 356 (2007), and the fact that CNAs sometimes make these assignments themselves indicates that no significant exercise of discretion is required.

The Employer contends that LPNs are required to exercise independent judgment in assigning tasks to floater CNAs, but the evidence on floater assignments is too imprecise to support such a conclusion. RN Unit Manager Zaylskus was the only witness to comment specifically on the assignment of floaters, and she testified only that LPNs decide where floaters work, without indicating what criteria the LPNs use in making floater assignments. The Employer cites other testimony generally indicating that employee expertise is considered in making assignments, but the witnesses did not provide specific examples in support of their general assertions. A finding of supervisory status cannot be based on conclusory claims.

*Loyalhanna Health Care Center*, 352 NLRB 863, 864 (2008). Rather, the party seeking a supervisory finding must produce “examples or details of circumstances showing” that employee skills and patient needs are considered. *Barstow Community Hospital*, above. In the case of floater assignments, the Employer has plainly failed to meet this standard.

The Employer also contends that LPNs exercise judgment in making decisions to shift CNAs between floors to cover staffing imbalances. The evidence on this point is in conflict, as some LPNs testified that only RN Supervisors and Unit Managers can transfer employees. The Employer only produced evidence of one situation in which an LPN decided that a CNA could be spared to help on another floor for two hours.<sup>16</sup> In any case, the Board has indicated that reassigning employees from overstaffed to understaffed areas is nothing more than an attempt to equalize workload and does not involve an exercise of supervisory judgment. *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Top Job Building Maintenance Co.*, 304 NLRB 902, 904 (1991).

The record does not indicate how frequently LPNs make light duty assignments, and the occasional, irregular assignment of such work, even assuming it involved independent judgment, would not confer supervisory status. *Bowne of Houston, Inc.*, 280 NLRB 1222, 1225 (1986). As the party asserting that the LPNs are supervisors, the Employer had the burden to show that light duty assignments are more than sporadic, and its failure to satisfy this burden precludes reliance on this function. Further, these assignments are largely dictated by restrictions set forth by Human Resources Manager Mohutsky, and assignments made in conformity with instructions from higher-level managers do not establish supervisory status. *Austal USA, LLC*, 349 NLRB 561, fn. 6 (2007), enfd. 343 Fed. Appx. 448, (11th Cir. 2009).

The same problem exists with respect to the designation of CNAs to help orient new employees. Even if LPNs can be considered as exercising supervisory judgment when they select a more experienced CNA to perform this function, the record indicates that the Nursing Scheduler often makes this selection; the record does not indicate how often the LPN is involved. Absent evidence that LPN selection of trainers is more than sporadic, I find that performance of this task cannot form the basis for a finding that the LPNs are statutory supervisors.

In short, I conclude that the Employer has not demonstrated that the LPNs exercise independent judgment in making work assignments to CNAs with sufficient frequency to justify a finding of supervisory status based on this authority.

## **B. Responsible Direction**

As defined by the Board in *Oakwood*, “direction” involves deciding what job should be undertaken next and which employee should do it, indicating the manner in which work is performed, and having the authority to take corrective action if the work is not done properly. *Oakwood*, above at 690-692; *Golden Crest Healthcare*, above at 730. The LPNs clearly perform some tasks that fit this definition. Their authority to adjust work assignments can be

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<sup>16</sup> In the only other example cited of a transfer between floors, the ADON, not an LPN, decided that a CNA could be moved.



characterized as deciding “what job should be undertaken next,” and the LPNs monitor CNA work performance to make certain that tasks are performed correctly. If they discover a mistake or omission, they call it to the attention of the responsible CNA and require the work to be done or redone.

The fact that LPNs “direct” CNA work does not, however, end the inquiry. To establish supervisory status, the direction must be “responsible” and require exercise of independent judgment. Direction is responsible if the asserted supervisor is held accountable and might suffer adverse consequences for non-performance. *Oakwood*, above at 691-692.

The Employer has met its burden of showing accountability. LPNs have been given disciplinary warnings for failing to make certain that CNAs do their jobs, which is enough to demonstrate that they are held accountable and might suffer consequences for not properly directing CNA work. *Croft Metals*, above at 722.<sup>17</sup>

The problem with the Employer’s assertion is in its proof of independent judgment. As explained in the preceding section of this Decision, no supervisory judgment is involved in the LPNs’ adjustment of CNA workloads or breaks. This leaves only the correction of CNA errors as an area in which LPN direction of CNA work might involve a sufficient exercise of discretion to confer supervisory status.

CNAs perform routine, unskilled labor, and their errors or omissions are obvious. Thus, for example, ice is either distributed or it is not, and linens are either picked up from the floor or left there. No judgment or discretion is required for LPNs to identify problems with CNA performance.

Nor is any significant exercise of judgment required to determine what action must be taken to correct mistakes. Obviously, ice must be distributed, and linens removed from the floor. Further, nothing in the record suggests that LPNs have the authority to choose to overlook errors - the fact that LPNs have been disciplined for failing to correct CNA errors suggests an opposite conclusion. LPNs who discover a problem with CNA work are obliged at least to require the CNAs to correct their errors or omissions. In sum, the LPNs’ direction of CNA work performance is routine and does not require an exercise of independent judgment sufficient to confer supervisory status.

This finding is consistent with past Board decisions. In monitoring CNA work, the LPNs are effectively performing a quality control function, and the Board has generally avoided finding supervisory status where an individual monitors and corrects the performance of employees doing routine, unskilled work. *Airport 2000 Concessions LLC*, 346 NLRB 958, 968 (2006); *Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB 635, 669 (2001), *enfd.* in pertinent part, 317 F. 3d 316 (D.C. Cir. 2003); *Control Services, Inc.*, 314 NLRB 421, 431

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<sup>17</sup> They have also received negative comments in their appraisals, although the record does not establish that these comments have any impact on their terms and conditions of employment. See *Barstow Community Hospital*, above at 1053; *Golden Crest Healthcare*, above at 731.

(1994); *Cobra Gunskin*, 267 NLRB 264, 267 (1983). As the Board noted in *Heritage Hall*, 333 NLRB 458, 459-460 (2001), the direction of employees whose jobs require little training and skill is “a routine activity and does not require the exercise of independent judgment.” I therefore find that the LPNs do not exercise sufficient judgment in their direction of CNA work to qualify them as statutory supervisors.

### **C. Evaluation**

The Employer has not established that LPNs prepare CNA evaluations on a regular basis. Although Employer witnesses testified that this task is part of the LPN job, most of the LPN witnesses testified that they do not evaluate CNAs. The Employer produced at the hearing only three CNA evaluations or “Competencies” prepared by LPNs, and two of them were of the same employee at the same time and effectively constituted a single evaluation. The third was ordered by an RN Unit Manager to remind a CNA that she should not overstay breaks.

Even if the Employer had shown that LPNs regularly prepare evaluations, however, this function would not be enough to establish them as supervisors. Evaluation is not one of the indicia of supervisory status listed in Section 2(11). Rather, the preparation of evaluations only confers supervisory status if the evaluation, by itself, affects the wages or job status of the individual being evaluated. *Willamette Industries, Inc.*, 336 NLRB 743 (2001); *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). CNA evaluations have no impact on wages, which are set forth in the collective-bargaining agreement, and there is no evidence that they otherwise affect CNA working conditions. Absent evidence of such an impact, I find that preparation of the evaluations does not confer supervisory status the LPNs.

### **D. Discipline**

Their job description indicates that LPNs have the authority to discipline and suspend other employees, and Human Resources Manager Mohutsky told some of the LPNs on one occasion that they could discipline CNAs. Standing alone, however, such general statements of authority are not enough to establish supervisory status; there must be evidence that the asserted authority has actually been exercised. *Loyalhanna Health Care Associates*, above at 864-865.

The Employer was unable to point to any instance in which an LPN personally issued discipline to a CNA. Instead, it contends that LPNs effectively recommend discipline by reporting CNA misconduct. Merely reporting misconduct, however, is not enough to establish the authority to discipline where higher-level managers conduct independent investigations before meting out punishment. *Los Angeles Water and Power Employees Assn.*, 340 NLRB 1232, 1234 (2003); *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002); *Vencor Hosp – Los Angeles*, 328 NLRB 1136, 1139 (1999).

Although the Employer asserts that discipline has been imposed based on LPN reports without independent investigation, this assertion was contradicted by the testimony of its own witness, RN Unit Manager Zaylskus, who indicated that she investigates reports of misconduct before determining discipline. Further, the incidents described at the hearing in which discipline was imposed after LPNs reported misconduct support a finding of independent investigation.

At least some investigation was undertaken by RN Managers in each of the reported cases before discipline was issued. In one instance, Zaylskus visited a resident's room to confirm an LPN report of a bedpan left in a sink. ADON Renee Rusnock personally interviewed a resident before issuing discipline in another case to make certain that misconduct had occurred. In two cases, managers reviewed records prior to giving out warnings to verify that CNAs had failed to record or erroneously recorded data. Managers reviewed witness statements before taking action in another case to confirm an LPN report of inappropriate remarks. The record does not contain any example of the Employer disciplining a CNA after accepting an LPN report of misconduct without further investigation.<sup>18</sup> Thus, the Employer has not established that LPN reports of misconduct automatically result in discipline without independent investigation.

In its brief, the Employer cites *Oak Park Nursing Care Center*, 351 NLRB 27 (2007), *Sheraton Universal Hotel*, 350 NLRB 1114 (2007), *Mountaineer Park, Inc.*, 343 NLRB 1473 (2004), and *Progressive Transportation Services*, 340 NLRB 1044 (2003), to support its claim of disciplinary authority. These decisions are easily distinguishable. In *Oak Park* and *Sheraton Universal*, the individuals found to be supervisors personally generated counseling forms or written warnings which constituted a form of discipline. In *Mountaineer Park* and *Progressive Transportation*, the asserted supervisors made verbal or written recommendations for disciplinary action which were routinely followed without independent investigation. Unlike the supervisors in those cases, the LPNs here do not issue discipline themselves or submit written recommendations, and any misconduct reported by the LPNs is independently investigated before action is taken. I therefore find that the Employer has not shown that the LPNs effectively recommend discipline.

#### **E. Hiring**

The Employer has shown that five of its approximately 45 LPNs have interviewed applicants for CNA positions. These interviews were conducted at the behest of Human Resources Manager Mohutsky, who requested the LPNs to ask the applicants questions designed to test their nursing skills. In most cases, Mohutsky asked the LPNs for an assessment of the applicants following the interviews, although there were several instances in which she did not even speak with the interviewers. When contacted, LPNs commented on candidates' skill levels and personalities, but they were not asked whether the candidates should be hired, although one of the LPNs offered her opinion anyway. Mohutsky independently interviewed all of the applicants and appears to have made the actual hiring decisions, and she testified that she attributes considerable importance to LPN opinions of candidates. The Employer did not,

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<sup>18</sup> The Employer identified two additional situations in which discipline was imposed and LPNs gave statements describing the misconduct which led to the discipline. The Employer did not, however, describe the surrounding circumstances in either of these situations. To support the Employer's position, the evidence would have to show that the LPN statements resulted in discipline without further investigation. The mere fact that LPNs prepared statements in cases where there was discipline does not prove that the LPNs effectively recommended the punishment.

however, provide evidence showing what opinions LPNs offered in the case of particular applicants or whether applicants interviewed by LPNs were or were not hired.

It is clear that the LPNs who interviewed applicants for CNA positions did not actually hire anyone. At best, the Employer can argue that LPNs effectively recommend hiring. But, participation in the process of interviewing applicants does not by itself establish the authority to effectively recommend employment, particularly where higher-ranking officials also participate. *Training School at Vineland*, 332 NLRB 1412, 1417 (2000); *Ryder Truck Rentals, Inc.*, 326 NLRB 1386, 1387, fn. 9 (1998); *Bowne of Houston*, above at 1225. In this case, Mohutsky not only interviews the applicants who also speak with LPNs, but she seems not even to have asked the LPNs whether they thought the applicants should be hired.

The Employer essentially argues that the LPNs, even if they do not actually provide an opinion as to whether a candidate should be hired, effectively recommend employment because Mohutsky attaches great weight to their positive assessments of candidate skills. Without specific evidence showing how LPNs rated candidates and how those ratings impacted Mohutsky's decisions regarding the candidates' employment, however, I find Mohutsky's general testimony about the weight attached to LPN opinions too vague to support a finding that she routinely accepted or rejected applicants based on what LPNs told her. And, absent evidence that Mohutsky routinely accepted LPN recommendations without making an independent assessment of candidate qualifications, I find that the Employer has not shown that LPNs effectively recommend the hiring of CNAs.<sup>19</sup> *Waverly-Cedar Falls Health Care, Inc.*, 297 NLRB 390, 392 (1989), *enfd.* 933 F.2d 626 (8th Cir. 1991).

#### **F. Grievance Adjustment**

LPNs are not involved in resolving contractual grievances filed by CNAs. Their role in resolving CNA complaints is limited to permitting them to switch breaks or agreeing to minor modifications in work assignments to accommodate employee preferences. LPNs may also alter assignments so CNAs do not have to work with patients or other employees they find difficult.

The Board has held that the authority to adjust minor complaints about scheduling, workload, or personality conflicts does not establish supervisory status. *Royal Health and Rehab Center, Inc.*, above, JD slip op. at 8-9; *Riverchase Health Care Center*, 304 NLRB 861, 865 (1991). Since the LPNs in this case can resolve only such minor complaints, I find that the Employer has not established that they have the authority to adjust grievances as that term is used in Section 2(11).<sup>20</sup>

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<sup>19</sup> Even if the evidence supported a finding that the five LPNs who interviewed candidates had effectively recommended employment, I would be reluctant to conclude that the LPNs had the authority to effectively recommend hiring. The Employer would need to show that it plans to have all of the LPNs participate in the interview process, a showing it has not made on this record.

<sup>20</sup> In *Passavant Retirement & Health Center v. NLRB*, 149 F.3d 243, 248 (3d Cir. 1998), and *Warner Co. v. NLRB*, 365 F.2d 435, 438 (3d Cir. 1966), the United States Court of Appeals for

### **G.     Secondary Indicia**

The Board will not find supervisory status based on secondary indicia absent evidence that the alleged supervisor possesses one or more of the powers set forth in Section 2(11) of the Act. *Bryant Health Care Center, Inc.*, above, JD slip op. at 7; *RCC Fabricators, Inc.*, 352 NLRB 701, 714, fn. 28 (2008).

The LPNs earn a higher hourly wage rate than the CNAs, which might suggest supervisory status, but they earn substantially less than the RNs, which could support the opposite conclusion.

If LPNs are viewed as supervisors, the ratio of employees to supervisors would be unusually low, less than two-to-one on the day and evening shifts and about two-to-one on the afternoon shift. This is particularly true considering that the CNAs primarily perform repetitive tasks that do not require substantial direction during their shifts. An unbalanced ratio of supervisors to subordinates militates against finding supervisory status. *Franklin Home Health Agency*, 337 NLRB 826, 831 (2002). The ratio thus supports a finding that LPNs are not supervisors.

Finally, although the LPNs' job title (LPN Supervisor) and job description suggest that they are supervisors, this "paper authority" is not determinative of supervisory status; the Board looks instead to whether the functions, duties, and authority of the position meet any of the Section 2(11) criteria. *Top Job Building Maintenance*, 304 NLRB 902, 904(1991); *Bowne of Houston, Inc.*, 280 NLRB 1222, 12225 (1986). In this case, as there is insufficient evidence that the LPNs meet any of the Section 2(11) criteria, I find that they are not supervisors within the meaning of the Act. Therefore, I shall direct an election in the petitioned-for unit.

## **V.     CONCLUSIONS AND FINDINGS**

1.     The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2.     The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3.     The Petitioner claims to represent certain employees of the Employer.

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the Third Circuit found that the resolution of minor complaints constituted grievance adjustment because of the possibility that the complaints might mature into contractual grievances. In this case, the contractual grievance procedure is narrowly drawn to encompass only disputes regarding the interpretation of the agreement, and the complaints handled by the LPNs involve scheduling and work assignment matters specifically reserved by contract to management. Thus, the disputes which the LPNs adjust are exempt from the formal grievance procedure.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Licensed Practical Nurses employed by the Employer at the Mountain City Nursing and Rehabilitation Center located at Rear 401-403 Hazle Township Boulevard, Hazle Township, Pennsylvania; **excluding** all Registered Nurses, RNACs, service and maintenance employees, business office and clerical employees, managers, guards and supervisors as defined in the Act.

## **VI. DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for the purposes of collective bargaining by **SEIU Healthcare Pennsylvania**. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

### **A. Eligible Voters**

The eligible voters shall be unit employees employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike, which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are: (1) employees who have quit or been discharged for cause after the designated payroll period for eligibility; (2) employees engaged in a strike who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

### **B. Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior*

*Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman–Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106 on or before **Friday, May 14, 2010**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by mail, facsimile transmission at (215) 597–7658, or by electronic filing through the Agency’s website at **www.nlr.gov**. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party. Guidance for electronic filing can be found under the **E-Gov** heading on the Agency’s website. Since the list will be made available to all parties to the election, please furnish a total of 2 copies, unless the list is submitted by facsimile or electronic filing, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

### **C. Notice of Posting Obligations**

According to Section 103.20 of the Board’s Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to 12:01 a.m. of the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

## **VII. RIGHT TO REQUEST REVIEW**

Pursuant to the provisions of Section 102.67 of the National Labor Relations Board’s Rules and Regulations, Series 8, as amended, a request for review of this Decision may be filed with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001.

Pursuant to the Board’s Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive

Secretary of the Board in Washington, DC by the close of business on **Friday, May 21, 2010, at 5:00 p.m. (ET)**, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time on the due date.** Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.<sup>21</sup> A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at **www.nlr.gov**. Once the website is accessed, select the E-Gov tab and then click on the E-filing link on the pull-down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Signed: May 7, 2010

/s/ [Dorothy L. Moore-Duncan]

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**DOROTHY L. MOORE-DUNCAN**

Regional Director, Region Four  
National Labor Relations Board  
615 Chestnut Street, 7<sup>th</sup> Floor  
Philadelphia, PA 19106

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<sup>21</sup> A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.